APPENDIX "A."

Respondents' Motion for Dismissal of Petition for Certiorari.

A. Certiorari not applied for within three months after entry of judgment below.

The petition herein (p. 4 bot.) states that, since a rehearing was denied by the Court of Appeals on January 3, 1946, the three months' period for filing a petition for certiorari "expires April 3, 1946" (R. 933). However, the record exhibits that petitioners filed their motion for rehearing in the Court of Appeals on December 21, 1945, *i. e.*, prior to the usual Court's recess for Christmas and the New Year, and that upon January 3, 1946, the lower Court entered an order denying the petition for rehearing (R. 933).

It nowhere appears that the Court below entertained petitioners' *motion for a rehearing. Rule 32* of the Court of Appeals for the First Circuit, insofar as pertinent, provides that a petition for rehearing "will not be granted, unless a judge who concurred in the judgment desires it, and a majority of the Court so determines." Hence, the petition for rehearing below did not toll the running of the period limited by *28 U. S. C. A.*, §350, for seeking a review of the judgment herein, as such motion did not at all operate to suspend the finality of the Court of Appeals' affirmatory judgment. It follows that the three months' period within which to apply for a writ of certiorari, would seem to have expired on or about February 24, 1946. As the record shows, petitioners' application was filed in this Court beyond the statutory period.

Federal appellate jurisdiction must affirmatively appear. *Southwestern Bell Tel. Co. v. Oklahoma,* 82 L. ed. 752, 755, col. 1 mid. The burden of proving jurisdiction rests

on the party who asserts it, not on those who challenge it. *McNutt v. General Motors Accept. Corp.*, 80 L. ed. 1135; *Patterson v. Stanolind Oil and Gas Co.*, 83 L. ed. 231, 232; *Clark v. Paul Gray*, 83 L. ed. 1001.

This Hon. Court has stated that a defeated party who applies for a rehearing and does not appeal within the time limited for so doing, takes the risk that he may lose his right of review, as the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal. *Wayne United Gas Co. v. Owens Illinois etc. Co.*, 81 L. ed. 557, 561.

B. Reasons in Court's opinions are not reviewable.

As heretofore shown (Point II, *ante* pp. 46-54), petitioner Porrata has no litigable or other interest in the certiorari proceedings which were appealed from the insular Supreme Court to the Court of Appeals. The petition in the District Court of Ponce for the surrender of the estate to the heirs and the rendition of supplemental accounts, was directed exclusively against the ex-executor, now petitioner Mario Mercado Riera (R. 348-358, 121).

That was a special proceeding arising out of Sections 832 and 833 of the Puerto Rico Civil Code (ed. 1930), to the effect that, upon expiration of an executorship's term, the incumbency terminates *ipso jure* even though not then completed; and that, if the executor refuses to turn over the estate or render accounts, he may be judicially compelled to do so, and the Supreme Court of Puerto Rico so determined (R. 114).

Petitioner Porrata, as ex-partitioner of the Mercado estate, did not possess the hereditary estate and, hence, he did not have either to return it or to render any accounts to the heirs; *a fortiori*, when Porrata, while partitioner, accepted a *compromise agreement* whereby the

properties of the estate were "adjudicated in equal parts" among the "testator's four heirs," further acquiescing in said contract among the coheirs and "agreeing to all of its covenants, terms and conditions insofar as they affect him as auditor-partitioner of the aforesaid estate, undertaking to abide by its provisions • • • " (R. 542 mid., 544 mid., 545).

The Supreme Court of Puerto Rico stated that Porrata, bearing in mind the fact that the heirs had "agreed regarding the form and terms of the partition or distribution of the estate," likewise consented to said contract (R. 116).

In this connection the Court of Appeals also refers to the adjudication of the estate by and between the heirs in equal parts, and to Porrata's consent thereto, as well as to *Porrata's lack of "any personal financial interest in any phase of the litigation before us on these appeals. His fee was agreed upon in the contract of compromise,* and appellees say in their brief *and Porrata admitted in argument before us, that this fee has been paid in full"* (R. 918, 919, 931 mid.; *Mercado Riera v. Mercado Riera,* 152 F. 2d 90, 96, col. 2 bot.). The Court of Appeals held that Porrata "is not officially affected by the judgments rendered by the court below" [insular Supreme Court]. "He never had any duty to administer the estate or to account for it, nor did he ever have possession of any of the assets of the estate or any duty to turn it over to the heirs • • •" (R. 931 mid.; *Mercado Riera v. Mercado Riera,* 152 F. 2d 97, col. 1 top).

It is, therefore, easy to conceive that, although Porrata apparently appealed as alleged "commissioner" from a judgment of the Supreme Court of Puerto Rico in certiorari No. 1517 (R. 121), *he complains only of certain excerpts in the opinion* rendered by the insular Supreme Court.

But, apart from the obvious correctness in all respects of the insular Supreme Court's decision on matters of local law, peculiarly within its knowledge, Courts' opinions do not constitute judgments from which appeal must be taken, as rights of parties are adjudged solely by decretal portion of a decree, and it is only such portion of a final judgment from which appeal lies. *McGhee v. Leitner*, 41 F. Supp. 647, 675; *Certain, etc., Corp. v. Wallinger*, 89 F. 2d 427, 429, col. 2; *Wright v. Gibson*, 128 F. 2d 865.

That is why respecting Porrata, the Court of Appeals said that "the final decisions of the Court below (local Supreme Court) are embodied in its judgments, not in its opinions, and its judgments, as we have shown, do not affect Porrata" (R. 932 mid.; *Mercado Riera v. Mercado Riera*, 152 F. 2d 97, col. 2 top).

And in *Herb v. Pitcairn* (1945), 89 L. ed. (Adv. Ops., 481, 486), this Court holds that its "power is to correct wrong judgments, not to revise opinions."

C. The judgments of the insular Supreme Court which were affirmed by the Court of Appeals, rested on adequate non-federal grounds.

The record shows that the Supreme Court of Puerto Rico *did not pass* upon any federal question at all and that its judgments were solely predicated upon sufficient non-federal grounds, that is, simply on sound local law of long standing (*ante*, 18-20, 53-56). See also opinion of insular Supreme Court (R. 97-121).

It was in the Court of Appeals that appellants, now petitioners, urged as alleged federal questions, that §40 of the Organic Act crystallized the form of procedure in the insular courts, etc. The argument, however, was dismissed as "unsound" (R. 923 mid., 924; 152 F. 2d 93, col. 1 mid.).

When, as above stated, the judgments of the local Supreme Court now sought to be reviewed, are predicated upon sufficient non-federal grounds, any contention regarding the existence of a federal question becomes untenable and dismissible. *Bell Tel. Co. of Pa. v. Van Dyke,* 80 L. ed. 379, 380; *Woolsey v. Best,* 81 L. ed. 3, 4; *Southwestern Bell Tel. Co. v. Oklahoma,* 82 L. ed. 752, 755; *McGoldrick v. Gulf Oil Corp.,* 84 L. ed. 536 (cert. dism.); *Holey v. Lawrence* 87 L. ed. 434; *Flourney v. Wiener,* 88 L. ed. 709; *Herb v. Pitcairn,* 89 L. ed. (Adv. Ops., 481, 482); *Copperweild Steel Co. v. Industrial Com.,* 89 L. ed. (Adv. Ops., 928, 930).

D. Lack of adequate or valid reasons for allowance of certiorari herein.

Review on a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. *Rule 38(5)* of this Court.

The questions and reasons relied on by petitioners here, are really frivolous as the judgments of the insular Supreme Court, affirmed by the Circuit Court of Appeals, (1) in no way conflict with any applicable decisions of this Court or with applicable local decisions, (2) nor do they depart from the accepted or usual course of judicial proceedings, (3) or in any way concern the public interest.

The questions presented and the alleged reasons urged in the petition (pp. 5-9), may be briefly summarized thus: 1, That the Supreme Court of Puerto Rico was without jurisdiction on certiorari to review certain orders of the Ponce District Court; 2, That the insular Supreme Court, on certiorari, could vacate any orders reviewed, but could not grant appropriate relief; 3, That there was alleged absence of due process as to petitioner Porrata; and 4,

That, as a matter of purely local law, the insular Supreme Court erred patently and inescapably in holding that there was no judicial administration of the estate involved, and that the executorship and partitionship expired in 1939.

In order to avoid superfluous repetition, respondents respectfully refer this Hon. Court's attention to Points I-VI of this brief, where it is clearly shown that the Supreme Court of Puerto Rico had complete jurisdiction on certiorari to the District Court of Ponce in cases Nos. 1516, 1517 and 1518 (*ante,* 40-46); that Porrata, as intervenor in certiorari No. 1517, lacked the requisite litigable interest to give him standing in court, and that, as to him, there was no absence of due process, as he was amply heard, even through counsel in the local Supreme Court (*supra,* 47-54, 57); that the insular Supreme Court had jurisdiction on certiorari to review proceedings Nos. 1516, 1517 and 1518 and to affirm or vacate and grant appropriate relief (*supra,* 59-61); that, as a matter of local law, the Puerto Rico Supreme Court correctly held that the executorship and partitionship legally expired in 1939, and that no judicial administration of decedent's estate had ever been sought or decreed (*supra,* 76-89).

On these esoteric questions of local law and practice of Spanish origin, the Court of Appeals said that the insular Supreme Court *"would seem to be patently correct"* (R. 930 near bot.; 152 F. 2d 86, 96, col. 2 top).

The Supreme Court of Puerto Rico decided nothing in conflict with applicable local practice and decisions or with the accepted and usual course of judicial proceedings.

The Court of Appeals properly held that *"we are far from convinced that the decision of the court below* [the Supreme Court of Puerto Rico] *in the instant case is at variance with its earlier decisions* * * *" (R. 924 top), and that, to refute such contention, now again urged by

petitioners here, "we need only to quote relevant decisions of the court below" [local Supreme Court] (R. 926). The Court of Appeals then proceeds to refer to numerous Puerto Rican decisions, to conclude that "it is abundantly clear that the Supreme Court of Puerto Rico under local law of long standing has discretionary power to issue writs of certiorari in order to expedite review even when review by appeal is available" (R. 928; 152 F. 2d 93, 94, 95).

Petitioner Porrata, without any foundation in fact or in law, insinuates that he was not accorded notice, hearing or due process below, and refers to *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027, 1032, and *Saunders v. Shaw,* 243 U. S. 317, 61 L. ed. 1163, as applicable decisions of this Court respecting due process.

But *Rule 38(5)(b)* suggests as a possible reason for review on certiorari, that a federal question was decided "in a way probably in conflict with *applicable* decisions of this Court." As already pointed out, *no federal question* has been *decided* by either the Supreme Court or the Court of Appeals *in conflict with any decision of this Court.* Respecting the point raised in the Court of Appeals by appellants there, now petitioners, regarding the effect by them ascribed to §40 of the Organic Act as to crystallizing the form of procedure in the insular courts, the Court of Appeals held that the Organic Act, §40, "intended merely to provide a basic procedure which, within constitutional and statutory limits, the insular courts, like courts administering the Common Law, could develop as they saw fit"; and, on further elaboration, the point was dismissed as "unsound" (R. 924; 152 F. 2d 93, col. 1 mid.).

As to petitioner Porrata, the Court of Appeals stated that he did not appear to have any personal financial in-

terest in any phase of the litigation; that his fee as partitioner was admitted by him to have been paid in full; and that even the judgments of the insular Supreme Court did not affect him (R. 931-932; 152 F. 2d 96, col. 2 bot.-97).

As the petition in the Ponce District Court against ex-executor Mario Mercado Riera, petitioner here, upon conclusion of his executorship, simply demanded of him the delivery of the estate to the heirs and the rendition of final supplemental accounts, it obviously did not concern Porrata. It was not directed against him, nothing was demanded of him and he never had possession of any of the assets of the estate. Hence, Porrata had no duty to return assets not in his custody nor to render any accounts thereon (R. 931 mid.; 152 F. 2d 96, col. 2 bot., 97).

Under the law of Puerto Rico, when a proceeding is not brought or directed against a person, he is not a necessary party *Flores v. Llompart,* 50 P. R. R. 641, 645 mid.; *Pellicia v. Court,* 36 P. R. R. 588; *Rodríguez v. Arocho,* 62 D. P. R. 700 (Spanish edition).

Obviously for that reason, among others, Porrata did not chose to intervene in the proceeding for the surrender of the estate in the Ponce District Court *under Section 72 of the Puerto Rico Code of Civil Procedure, ed. 1933,* notwithstanding he well knew of its pendency (*ante,* 48). Concerning Porrata's separate and new proceeding for the purported approval of his so-called report or draft of partition, subsequently filed by him in the Ponce District Court, see *supra,* pp. 35-39, 47-50. But Porrata, by his intervention in the insular Supreme Court, certiorari No. 1517, accepted and invoked its jurisdiction and powers on the merits (R. 83-96), to set aside the writ of review issued *and to enter any other proper pronouncements* (R. 69), thus inviting action and rulings by the local Supreme Court, which had jurisdiction over the parties and the

subject-matter. *Porrata also lodged an answer* to certiorari petition No. 1517 in the insular Supreme Court *joining issue on the merits and urging practically the same objections which had been raised by the ex-executor Mario Mercado Riera, petitioner here* (R. 83-96, 65). Porrata further argued the case at the hearing before the Supreme Court through counsel (R. 96 bot.). The Court of Appeals also states that Porrata "filed an answer to the petitions for certiorari and a brief in support thereof, and his counsel was heard orally" (R. 921 mid.; 152 F. 2d 91, col. 2 bot.).

Hence, it is quite plain that Porrata was amply heard by the insular Supreme Court in all respects.

That is sufficient reason, in addition to what has already been stated, why the cases of *Coe v. Armour Fertilizer Works* and *Saunders v. Shaw, supra,* cited in petitioners' brief, pages 57, 59, are not apposite here and can in no way conflict with any alleged federal or other question decided by either the local Supreme Court or the Court of Appeals. In neither the *Coe* nor the *Saunder* cases concurred the facts and circumstances surrounding certiorari proceeding No. 1517 of the insular Supreme Court. In No. 1517 Porrata, through his intervention in the Puerto Rico Supreme Court, was accorded full hearing and argument, *though he never had been a necessary party in the Ponce Court of first instance, because the proceeding was not directed, nor was judgment demanded, against him.*

As to the reason given in the certiorari petition (Br. 5 bot., 8, 62) that, as a matter of purely local law, the insular Supreme Court erred in holding that no judicial administration of the estate was granted and that the executorship and partitionship expired by law in 1939, it would seem sufficient to refer to respondents' brief (Point VI, pp. 75-87). It is there shown that the insular Supreme Court justly, intelligently and logically, held

that, in harmony with Puerto Rican law and practice, the executorship and partitionship in the Mercado estate legally expired in 1939; that no judicial administration of decedent's estate had even been sought or decreed, and that no judicial administration of decedent's estate in Puerto Rico may arise by estoppel or implication.

Uninterrupted and numerous rulings of this Court, point to the doctrine of deference to the understandings of matters of local law as expressed in the pronouncements of insular tribunals. Their decisions, even when reviewable, should not be disturbed except upon a clear showing of patent or inescapable error. *Díaz v. González*, 67 L. ed. 550, 552; *Bonet v. Yabucoa Sugar Co.*, 83 L. ed. 949; *Bonet v. Texas Co.*, 84 L. ed. 405; *Puerto Rico v. Rubert Hnos.*, 86 L. ed. 1081, 1088, col. 2 mid.; *De Castro v. Board of Comm.*, 88 L. ed. 1384; *Hijos v. Commins*, 88 L. ed. 1396. The Court of Appeals, after fully and carefully considering the whole situation, determined that the insular supreme court *"would seem to be patently correct"* (R. 930 mid.; 152 F. 2d 96, col. 2 top, 97).

The foregoing manifestly exhibits that the certiorari petition urges no reviewable question, and much less any point which it is in the *public interest* to have decided by this Court of last resort. The petition states (p. 6 mid.) that: *"The Government and People of Puerto Rico,* as well as these petitioners, have at least a strong *moral right"* to be told "by the highest judicial tribunal of the nation," whether the insular Supreme Court is permitted by the Federal Organic Act to review by certiorari insular District Court's orders "of the nature of those vacated in these cases."

Of course, a *moral right* is no legal ground for invoking the jurisdiction of this Honorable Court. Legal, not merely moral rights are a proper subject for judicial

enforcement or review. *1 C. J.*, Section 48, p. 952; *1 C. J. S.*, Section 10, p. 993.

The record demonstrates that the three certiorari proceedings in the Puerto Rico Supreme Court, involved only *questions of a private character between private citizens*, like, among others, "whether the executorship of Mario Mercado is in force" under local law (R. 97 bot., 110). The Court of Appeals found that this litigation emerges from a "controversy between three of the four children and heirs of one Mario Mercado, a widower, who died, testate, domiciled in Puerto Rico * * *" The controversy and decisions thereon, solely concern the parties to the several proceedings in the local courts. The Government and the People of Puerto Rico have absolutely no interest herein.

In *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. ed. 922, 924, col. 1 bot., this Court held that jurisdiction to bring up cases by writs of certiorari from the Circuit Courts of Appeal, was conferred upon the Supreme Court of the United States for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and, second, "to bring up questions of importance which it is in the *public interest* to have decided by the court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*"

E. Petitioners' want of litigable interest. Moot character of questions presented.

1. *In case No. 1516 of the local Supreme Court* (R. 1-11), the decision simply vacates service (R. 97 bot., 98, 120 bot.) of a claim for fees (R. 366) which was attempted to be served by attorneys Zapater and Ochoteco, as claimants, on attorneys who acted for respondents (R. 369,

374 bot.) in other and separate proceedings. The ex-executor, now petitioner Mario Mercado Riera, who attempted to appeal (R. 24) therefrom to the Court of Appeals was really *a defendant* (R. 369 near bot.) in said proceeding No. 1516.

a. Wherefore, it becomes evident that the only parties aggrieved by that decision, if at all, were claimants, the said attorneys Zapater and Ochoteco (R. 366 bot.). *But they did not appeal.* As already stated, in No. 1516, review was sought in the Court of Appeals only by the ex-executor Mario Mercado Riera, who was not aggrieved and, *as codefendant, was obviously favored* by the decision of the local Supreme Court in that case. So, he clearly has not any reviewable interest.

b. Hence, any proposed review in No. 1516, merits immediate dismissal (*In re Schwartz,* 89 F. 2d 172, 173; *In re Kane,* 48 F. 2d 97, 98; *Olsen v. Jacklowitz,* 74 F. 2d 718; *Harding v. Nat. Bank,* 31 F. 2d 914).

2. *In No. 1517,* copetitioner, the ex-commissioner for partition Pedro M. Porrata, attempted to appeal to the Court of Appeals, in his supposed representative capacity (R. 126), *not even individually,* from a judgment of the insular Supreme Court of July 14, 1943 (R. 121)—

> "ordering the ex-executor Mario Mercado Riera to proceed to deliver the estate left by Mario Mercado Montalvo to his heirs María-Luisa, Adrián, Margarita and Mario Mercado Riera, in compliance with the compromise contract executed on September 9, 1938, and also to render them supplementary accounts as from October 27, 1941, when the former accounts were rendered, until the time of such delivery, for all of which he is allowed a term of sixty days."

a. It is readily noted that the order objected to by the ex-commissioner, *does not concern him individually nor*

in any other capacity at all; it simply refers to the ex-executor Mario Mercado Riera, now petitioner, who withheld the estate from the heirs and was bound and required to render them supplemental accounts.

b. This also inescapably follows from a sworn petition filed in the insular Supreme Court by the ex-commissioner, Pedro M. Porrata, in August, 1943, *i. e.*, after the judgment was rendered by the Puerto Rico Supreme Court on July 14, 1943. In that petition for a supersedeas (pp. 8-9, Spanish text), ex-commissioner Porrata expressly stated and acknowledged (translated into English):

> "XI. That the commissioner for partition *has none of the assets of the estate in his possession,* and has no objection to their being administered by their actual executor, Mr. Mario Mercado Riera, by the district court of Ponce through an administrator or by the four heirs, as decreed by the judgment of this Hon. Court; by reason whereof, the amount of the bond to be fixed, in the circumstances, should be purely nominal" (see R. 141).
>
> "XII. * * * 2. That movant has none of the hereditary assets in his possession. 3. *That movant does not object to the administration of the assets by one or by all the four heirs,* by the district court of Ponce or in any other form agreeable to the owners" (see R. 142 mid.).
>
> (Certified copy of the foregoing excerpts, issued by the Secretary-Reporter of the Supreme Court of Puerto Rico, is made a part hereof, as Sub-Appendix A-II.)

c. It further appears that ex-commissioner Porrata has no personal or financial interest in case No. 1517, as even his alleged fees ($20,000), not here involved, *happen to have been paid to him,* though illegally, by the

ex-executor's check, charged to the heirs, in November, 1941 (*infra*, p. 109).[60]

d. To entitle one to a review by an appellate federal court, petitioner or appellant must have a personal, direct, immediate, pecuniary, substantial and subsisting interest in the matter in question, which has been adversely affected by the ruling complained of. When such interest does not exist, the appeal should be dismissed. *In re Michigan-Ohio Bldg., Corp.*, 117 F. 2d 191, 193; *Longest v. Langfort*, 72 L. ed. 473; *Hamilton Trust Co. v. Mines Co.*, 223 Fed. Rep. 494, cert. den. 60 L. ed. 482.

e. Furthermore, ex-commissioner Porrata took his pretended appeal to the Court of Appeals in No. 1517 in his supposed *representative capacity* (R. 126) *only, not individually*. The personal character of his claimed interest in the alleged fees, precludes his efforts at further review in a representative capacity (3 C. J. 646), even though such matter had been involved in the local Supreme Court, which is not the case, and even assuming that the fees had not already been paid to the ex-commissioner by the ex-executor (*infra*, 109; R. 931).

3. *In cases Nos. 1517 and 1518, the allowance of the review sought by the ex-executor Mario Mercado Riera, petitioner herein, can serve no beneficial purpose, as the questions presented by him have also become moot or abstract and any possible appellate remedy would be ineffectual in the premises.*

a. After rendition of the judgments by the local Supreme Court on July 14, 1943 (R. 24, 121, 181), which the ex-executor, now petitioner, seeks to have reviewed, he filed in the insular Supreme Court *a sworn motion* for a

[60] As lack of interest, like absence of jurisdictional amount, affects reviewing Court's jurisdiction, it may be shown by extrinsic evidence (*Mills v. Green*, 40 L. ed. 293; *Dakota v. Glidden*, 28 L. ed. 981; *Kimball v. Kimball*, 43 L. ed. 932, 934; *Clark v. Gray*, 88 L. ed. 1001).

supersedeas bond (R. 155-161), wherein he admits having sent a letter to respondents, and copy to the other heir Margarita Mercado Riera, reading (translated into English), thus:

"My dear sirs:

"This is to inform you that insofar as concerns the estate left at the decease of our father, Mario Mercado Montalvo, *I consider myself disconnected therefrom in every sense, except as co-owner thereof,* in accordance with what was agreed in the compromise agreement of September 9, 1938, *and all business concerning same must be transacted through the heirs and not through its executorship.* Therefore, and as the undersigned, in connection with said estate, has only exercised the powers conferred on him by the compromise agreement as executor and co-owner thereof, I beg to communicate that I shall notify all persons who hold properties of the estate as lessees or in any other manner, that from this day, instead of transacting business with the succession of Don Mario Mercado Montalvo through the executorship, they must do so with all the heirs as co-owners of the estate. Respecting yourselves, on or before September 10, 1943, *I shall send you the final supplementary account, advising you that you must begin to provide in accordance with the circumstances, for I consider myself completely disconnected from the collection of debts and payment of obligations of the hereditary estate* left at the death of our father, *and without any jurisdiction over the estate,* except such as refers to the undersigned as co-owner thereof, and such as may result from the fact that this inheritance was accepted on benefit of inventory. I take this step without prejudice to the appeal taken by the executorship from the judgment of the Supreme Court of Puerto Rico dated July 14, 1943, in cases Numbers 1516, 1517 and 1518, certiorari, brought by Mrs. María Luisa and Mr. Adrián Mercado Riera, so as not to have any

bearing (acción) on the estate pending the appeal, and, of course, under compulsion of the aforesaid judgment.—Very truly, Executorship of Mario Mercado Montalvo, by Mario Mercado, Jr., Executor." (*Italics supplied.*)

b. That in the latter part of August, 1943, the ex-executor, now petitioner Mario Mercado Riera, filed another motion in the insular Supreme Court (case No. 1517), advising having mailed upon August 10, 1943, a letter to debtors, lessees, legatees and other creditors of the estate, with copies thereof to appellees—

> "advising of the necessity to transact the affairs connected with said estate through the four heirs of the succession of Don Mario Mercado Montalvo, from August 7, 1943, and not through the executorship, as had been done heretofore."

The matters or excerpts set forth in preceding paragraphs "a" and "b," are evidenced by certificate issued by the Secretary-Reporter of the Supreme Court of Puerto Rico, attached hereto as *Sub-Appendix A-II. See footnote 60.*

c. Dated September 9, 1943, the ex-executor, petitioner Mario Mercado Riera, mailed a letter addressed to respondents, María-Luisa and Adrián Mercado Riera, and to the other coheir, Margarita Mercado Riera, together with the *final supplemental accounts* which were ordered to be rendered by the judgment of the Puerto Rico Supreme Court (R. 121). In said letter of September 9, 1943, the ex-executor stated:

> "I again definitely place in your possession the properties of the estate, *considering myself disconnected therefrom* respecting the functions which I had been exercising concerning them in accordance with the said compromise agreement and the law, reserving, of course, my rights as coheir of said estate, and without prejudice to the appeal

> taken by me before the Circuit Court at Boston, from the judgment entered by the Supreme Court of Puerto Rico dated July 14, 1943, in certiorari cases numbers 1516, 1517 and 1518." (*Italics ours.*)

The final supplemental account rendered by the petitioner Mercado, has been extrajudicially objected to in writing by the respondents and by their sister Margarita Mercado Riera.

d. Upon October 9, 1943, petitioner Mario Mercado Riera, mailed another letter to respondents, who received it, and to their sister Margarita Mercado Riera, advising them, with reservation of his rights *as coheir* of the estate, to have—

> "placed in possession of Don Francisco Parra Capó, in his office at Calle Amor, No. 2, Ponce, Puerto Rico, the documents, deeds, certificates of stock, etc., etc., belonging to the succession of Don Mario Mercado Montalvo, as per list attached hereto, so that said documents may be accessible to all the four heirs of the succession of Don Mario Mercado Montalvo."

e. By petitioner Mercado's conduct in disclaiming interest in the estate except as coheir, and by his notices to lessees, legatees and other creditors, requiring them to transact all further business with the four heirs, and not through the ex-executor, respondents and their sister Margarita Mercado Riera, since the judgment rendered by the insular Supreme Court in No. 1517 (July 14, 1943), were induced and have discharged or paid off their three-fourth part of all legacies and interests which were due by the estate of Mario Mercado Montalvo, and also, on March 1, 1944, their three-fourth part of income-tax deficiencies assessed against the estate by the insular Treasurer, etc.

(1) To accomplish that, respondents and their sister Margarita sold their three-fourth interest in several urban properties of the estate to the other co-heir, as vendee, now ex-executor and petitioner Mario Mercado Riera, by deed No. 44, dated November 18, 1943, executed before Notary Public J. C. Santiago Matos, whereby the said petitioner paid vendors the sum of $70,350 which they applied, with other funds, to the extinction of their share in the aforesaid liabilities.

(2) Subsequently, respondents, Adrián, María-Luisa Mercado Riera and their sister Margarita, as well as petitioner Mario Mercado Riera, the ex-executor, sold for $10,000 ($2,500 for each of the four heirs), the shares of stock belonging to the estate of Mario Mercado Montalvo in Bazar Atocha, Inc., of Ponce, Puerto Rico, etc.

(As to statements in foregoing paragraphs "c," "d" and "e," see Sub-Appendix A-1.)

f. In view of the ex-executor's conduct subsequent to the judgment of the local Supreme Court affirmed by the Court of Appeals, now sought to be reviewed, as such conduct appears from paragraphs "a" to "e" above (abandonment of the estate by the ex-executor; requesting legatees and creditors to transact all business with the heirs instead of through the ex-executorship and asking the heirs to do the same; buying of his co-heirs interest in several of the properties of the estate and joining them in selling to strangers a part thereof), it must be concluded that any further controversy between said petitioner and his co-heirs as to his supposed right to withhold the estate, has become moot.

(1) Petitioner Mercado's spontaneous procedure, following entry of the local Supreme Court's judgment against him, is plainly inconsistent with his petition for certiorari herein, notwithstanding his so-called reservations, *and renders ineffectual any possible appellate rem-*

edy. Talbot v. Mason, 125 Fed. Rep. 101, estoppel to continue appeal; *Chiesa v. Life Ins. Co.,* 169 Fed. Rep. 509, question academic and cert. den. 54 L. ed. 344; *Lisman v. Trust Co.,* 211 Fed. Rep. 413, 417, moot issues shown by extrinsic evidence; *Goldstein v. Behrends,* 123 Fed. Rep. 399, want of controversy; *Radio Corp. v. Chicago Bears F. Club,* 97 F. 2d 223, 224, appellate remedy ineffectual; *Hubbard v. Art Museum,* 196 Fed. Rep. 871, 874; *Vidal v. Securities Co.,* 276 Fed. Rep. 857, 874, no effectual appellate relief.

WHEREFORE, petitioners' application for certiorari herein should be dismissed.

Respectfully submitted,

JOSÉ A. POVENTUD,
Attorney for respondent,
ADRIÁN MERCADO RIERA.

CELESTINO IRIARTE,
F. FERNÁNDEZ CUYAR,
H. GONZÁLEZ BLANES,
Attorneys for respondent,
MARÍA-LUISA MERCADO RIERA.

SUB-APPENDIX NO. A-1.

Affidavit by Salvador S. Mandry, Esq.[61]

I, SALVADOR S. MANDRY, being duly sworn, do depose and say:

That I am of full legal age, married to Margarita Mercado Riera, one of the heirs of the estate left by Mario Mercado Montalvo; that I reside in Ponce, Puerto Rico, and am now one of the attorneys in fact for Adrián, María-Luisa and Margarita Mercado Riera; and that I have personal knowledge of the following facts, to wit:

1. That Mario Mercado Riera, ex-executor of the estate of Mario Mercado Montalvo, on September 9, 1943, served on Adriàn, María-Luisa and Margarita Mercado Riera, his co-heirs, "final supplemental accounts from March 5, 1940 to August 31, 1943," on page 2 whereof under the heading *"DISBURSEMENTS"* (EGRESOS), there appears an item, charged to the said heirs, reading (translated into English), thus:

> "Pedro M. Porrata, Commissioner for Partition (Contador-Partidor) $20,000.00."

2. That the original entry of such disbursement appears under date of November 17, 1941, in quarterly supplemental accounts (October 24, 1941 to January 31, 1942), extrajudicially rendered by the said ex-executor to Adrián María-Luisa and Margarita Mercado Riera, and the said entry (translated into English), is as follows:

---

[61] This affidavit and a certificate issued by the Clerk of the insular Supreme Court (SUB-APPENDIX A-II), were filed in the Appellate Court below. Both documents had been additionally certified to supplement the record here, by the Clerk of the Court of Appeals.

"Paid to attorney Pedro M. Porrata, by check Number 253, fees agreed in compromise contract of September 9, 1938, issued in favor of the beneficiary, as Commissioner for Partition of the estate of Mario Mercado Montalvo $20,000.00."

3. That, dated September 9, 1943, Mario Mercado Riera mailed a letter addressed to María-Luisa, Adrián and Margarita Mercado Riera, together with final supplemental accounts, in which letter Mario Mercado Riera stated (translated into English):

"I again definitely place in your possession the properties of the estate, considering myself disconnected therefrom respecting the functions which I had been exercising concerning them in accordance with the said compromise agreement and the law, reserving, of course, my rights as co-heir of said estate, and without prejudice to the appeal taken by me before the Circuit Court at Boston, from the judgment entered by the Supreme Court of Puerto Rico, dated July 14, 1943, in certiorari cases numbers 1516, 1517 and 1518."

4. That the said final supplemental account rendered by Mario Mercado Riera has been extrajudicially objected to in writing by María-Luisa, Adrián and Margarita Mercado Riera.

5. That upon October 9, 1943, Mario Mercado Riera mailed another letter to Adrián, María-Luisa and Margarita Mercado Riera, notifying them, after reserving his rights as co-heir of the estate, and without prejudice to his appeal taken to the Court of Appeals for the First Circuit, to have—

"placed in possession of Don Francisco Parra Capó, in his office at Calle Amor, No. 2, Ponce, Puerto Rico, the documents, deeds, certificates of stock, etc., etc., belonging to the succession of Don Mario Mercado Montalvo, as per list attached here-

to, so that said documents may be accessible to all the four heirs of the succession of Don Mario Mercado Montalvo."

6. That by the said Mario Mercado Riera's conduct in disclaiming interest in the estate except as co-heir, and by his notifications to lessees, legatees and other creditors, requesting them to transact all further business with the four heirs and not through the executorship, María-Luisa, Adrián and Margarita Mercado Riera, since the judgment rendered by the Supreme Court of Puerto Rico in case No. 1517 (July 14, 1943), were invited to and they did pay off, through affiant, their three-fourth part of all legacies and interests which were due by the estate of Mario Mercado Montalvo, and also, on March 1, 1944, they further paid off their 3/4 part of income tax deficiencies assessed against the said estate by the insular Treasurer, etc.

7. That in order to accomplish such payments, Adrián, María-Luisa and Margarita Mercado Riera sold their three-fourth interest in several urban properties in the said estate to the other co-heir, as vendee, Mario Mercado Riera, by deed No. 44, dated November 18, 1943, executed at Ponce before Notary Public, J. C. Santiago Matos, whereby the said Mario Mercado Riera paid vendors the sum of $70,350, which they applied with other funds to the extinction of their three-fourth share in the mentioned liabilities; and that, subsequently, Adrián, María-Luisa and Margarita Mercado Riera, as also Mario Mercado Riera, have sold for ten thousand dollars ($2,500 for each of the four heirs), the shares of stock belonging to the estate of Mario Mercado Montalvo in Bazar Atocha, Inc., of Ponce, Puerto Rico, etc.

SALVADOR S. MANDRY,
Affiant.

Island of Puerto Rico,
District of Ponce, ss:

Sworn to and subscribed before me by Mr. Salvador S. Mandry, of Ponce, Puerto Rico, U. S. A., of full legal age, married to Margarita Mercado Riera, agriculturist, to me personally known, at Ponce, Puerto Rico, this 7th day of March, A. D., 1944.

GUSTAVO RODRIGUEZ,
Notary Public.

AFFIDAVIT No. 21.

I, Joaquin López Cruz, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is the genuine signature of Mr. Gustavo Rodríguez, of Ponce, P. R., a Notary Public in and for the Island of Puerto Rico, duly authorized and commissioned as such.

San Juan, Puerto Rico, March 8, 1944.

JOAQUIN LOPEZ,
Secretary-Reporter,
Supreme Court of Puerto Rico.

SUB-APPENDIX NO. A-II.

IN THE SUPREME COURT OF PUERTO RICO.

María-Luisa Mercado Riera de Belaval and Adrián Mercado Riera, Petitioners, v. District Court of Ponce, Hon. Ramón A. Gadea Picó, Judge, Respondent.	No. 1517 Certiorari.

Certificate by the Secretary-Reporter of the Insular Supreme Court as to Part of the Record in the Above Matter.[62]

I, Joaquin López, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That from a sworn petition for the fixing of a supersedeas bond filed in the above entitled cause by Pedro M. Porrata, in August, 1943, the following (translated into English) appears:

> "XI. That the commissioner for partition has none of the assets of the estate in his possession, and has no objection to their being administered by their actual executor, Mr. Mario Mercado Riera, by the district court of Ponce through an administrator or by the four heirs, as decreed by the judgment of this Hon. Court; by reason whereof, the amount of the bond to be fixed, in the circumstances, should be purely nominal."
>
> "XII. * * * 2. That movant has none of the hereditary assets in his possession. 3. That movant does not object to the administration of the assets

[62] See footnote 61.

by one or by all the four heirs, by the district court of Ponce or in any other form agreeable to the owners thereof."

That in August, 1943, Mario Mercado Riera filed in the above entitled cause a sworn motion for supersedeas bond in connection with his appeals to the Circuit Court of Appeals for the First Circuit, wherein he inserts a letter addressed to María-Luisa and Adrián Mercado Riera, stating that copy was sent to Margarita Mercado Riera, which letter (translated into English), reads thus:

"My dear sirs:

"This is to inform you that in so far as concerns the estate left at the decease of our father, Mario Mercado Montalvo, I consider myself disconnected therefrom in every sense, except as co-owner thereof, in accordance with what was agreed in the compromise agreement of September 9, 1938, and all business concerning same must be transacted through the heirs and not through its executorship.

"Therefore, and as the undersigned, in connection with said estate, has only exercised the powers conferred on him by the compromise agreement as executor and co-owner thereof, I beg to communicate that I shall notify all persons who hold properties of the estate as lessees or in any other manner, that from this day, instead of transacting business with the succession of Don Mario Mercado Montalvo through the executorship, they must do so with all the heirs as co-owners of the estate.

"Respecting yourselves, on or before September 10, 1943, I shall send you the final supplementary account, advising you that you must begin to provide in accordance with the circumstances, for I consider myself completely disconnected from the collection of debts and payment of obligations of the hereditary estate left at the death of our father, and without any jurisdiction over the estate, except such as refers to the undersigned as co-owner thereof, and such as may result from the

fact that this inheritance was accepted on benefit of inventory.

"I take this step without prejudice to the appeal taken by the executorship from the judgment of the Supreme Court of Puerto Rico dated July 14, 1943, in cases numbered 1516, 1517 and 1518, certiorari, brought by Mrs. María-Luisa and Mr. Adrián Mercado Riera, so as not to have any bearing (acción) on the estate pending the appeal, and of course, under compulsion of the aforesaid judgment.

"Very truly,

"EXECUTORSHIP OF MARIO MERCADO MONTALVO

"By (Sgd) Mario Mercado, Jr.

"Mario Mercado, Jr.
Executor.

"Mmjr-jvd
"2c/o Doña Margarita Mercado Riera
"cc Lcdo. Pedro M. Porrata, Commissioner for Partition."

That dated August 21, 1943, Mario Mercado Riera filed another motion in the above matter, stating that he had mailed, upon August 10, 1943, a letter to debtors, lessees, legatees and other creditors of the estate of Mario Mercado Montalvo, with copies thereof to appellees—

> "advising of the necessity to transact the affairs connected with said estate through the four heirs of the succession of Don Mario Mercado Montalvo, from August 7, 1943, and not through the executorship, as had been done heretofore."

I further certify that the foregoing is a true and faithful translation of the original papers above referred to, as filed in the Spanish language in the above cause and under my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court, in the City of San Juan, Puerto Rico, this 8th day of March, 1944.

JOAQUIN LOPEZ,
Secretary-Reporter,
Supreme Court of Puerto Rico.